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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 124

NORVEL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

BRIEF OF RESPONDENT.

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Statement of Jurisdictional Grounds.

Liability is predicated upon the Federal Employers Liability Act and the so-called Safety Appliance Acts of Congress.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 124.

NORVEL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

The accident occurred on the 6th day of February, 1937. The "run" of the local freight train upon which the petitioner was working extended from Durand, Michigan sixty miles into Milwaukee Junction, which is on the outskirts of Detroit. The engine and crew, including petitioner, left Durand the day before, took their train into Milwaukee Junction, laid over night and were making the return trip to Durand, with the same engine at the time of the accident at Ferndale, seven miles out (R. 24).

One of petitioner's duties as brakeman was to take on water. The engine had stopped at the waterspout at Ferndale for that purpose. The engineer and fireman were in the cab. Petitioner got upon the tender and found that

there was ice on the deck of it. While pulling the waterspout around the hook slipped from the waterspout and petitioner slipped on the ice, lost his balance and fell over the side of the tender to the ground from which he sustained his injuries (R. 13).

Petitioner testified "in front of the manhole where the—that is the hole that the spout is put down into to take the water, right at the seam on top of the tender where the two join together, there was water coming out of there, at the front of this manhole, right at the seam." He testified that it was a small stream and that it spread over the tender. That was the day before the accident (R. 20; 49). Though the engineer is supposed to report in writing at the end of the run any defects reported to him (R. 49, 68) yet petitioner told no one about this condition (R. 53, 68).

Petitioner's testimony about the leak is all the direct testimony there is in the record as to how the ice got there. Since that source was eliminated by the special verdict speculation alone was left as to whether it came there from the negligence of other employees, the weather, or acts of third parties. The engine had been out of the roundhouse on this run about 40 or 50 minutes when the accident happened (R. 21). The engine was filled at the roundhouse the night before and put in the roundhouse until needed (R. 89). The temperature outside the morning of the accident was 20 or 30 degrees above zero (R. 23). The roundhouse was warmer than the outside (R. 23).

In the complaint were five paragraphs charging negligence. Paragraph 4(a) charged that the respondent negligently supplied a defective hook with which the waterspout was pulled over the tender and 4(b) charged that the respondent negligently supplied a waterspout which was defective. Paragraphs 4(a) and (b) were voluntarily dismissed by the petitioner at the close of his case (R. 59). Inasmuch as the allegations of the three remaining para-

graphs of the complaint are involved on this appeal we set them forth verbatim:

"4(c) The defendant did carelessly, negligently, wrongfully and unlawfully furnish the plaintiff with a place to work and require the plaintiff to work at a place, in the performance of his duties as employee, which place was unsafe and dangerous to human safety in that the defendant required the plaintiff, in the performance of his duties, to stand and be upon the engine tank described heretofore for the purpose of moving the waterspout over the engine tank to supply water to this engine tank, yet the defendant carelessly, negligently and wrongfully allowed, caused and permitted ice to be, remain and accumulate on this engine tank at the place where it required plaintiff to so work in the performance of his duties, with great danger to plaintiff; and of these facts the defendant had due notice, and by and through such careless, negligent and wrongful conduct on the part of the defendant, plaintiff, while he was in the performance of his duties as employee of this defendant, attempting to move the waterspout in position over the tank, was by reason of the ice on the tank caused to slip and fall and lose his balance, and was caused to be thrown, drop off the engine tank to the ground, and sustain serious injuries." (R. 3.)

"(d) Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that the defendant required, caused and permitted plaintiff to work on the tender of the locomotive of his train on the occasion above charged, in the act of putting water in the tender of the locomotive, this tender was unsafe because the top where the plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life and limb, and the tender leaked there, and while he was so at work, as above charged, he slipped

on this slippery and unsafe condition on top of the tender and was thrown and caused to fall and be seriously einjured." (R. 4.)

"(e) Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard, Michigan, a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the defendant did operate this locomotive and tender with the tender of this locomotive at the part where the water is supplied to and poured into the locomotive to be cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, hole and aperture and to flood, seep and cover the top of the tender where plaintiff was required to be in the performance of his duties as employee, rendering it likely and liable for the water to freeze and cause a dangerous condition, and thereby, by reason of this violation on the part of the defendant of this Federal Safety Appliance Act, the water in this tender did leak through this defective place onto the top of the tender and did freeze, and it thereby caused plaintiff, while he was so at work, as above charged, on the top of this tender, to slip and be thrown and seriously injured." (R. 6.)

At no place in the complaint or in the testimony was it charged that there was a violation of the rules of the Interstate Commerce Commission. These rules were first alluded to when the petitioner filed his petition for rehearing in the Appellate Court of Illinois (R. 144).

In the trial court petitioner's theory of the case as to the Boiler Inspection Act was evidenced by an instruction prepared by him and given at his request as follows (R. 118):

"Plaintiff makes several charges in his complaint. One charge is that the defendant unlawfully violated an Act of Congress relating to locomotive engines known as a Safety Appliance Act: He charges that defendant used on this occasion a locomotive and

tender which was in improper condition and unsafe because at a place on the tender where water is supplied, it was cracked, worn and split so as to occasion and permit water leaking from this crack to flood, seep and cover the top of the tender, rendering it likely to freeze, and that such water did freeze on the top of the tender where plaintiff was so at work, and that he was thereby caused to slip and be thrown."

On the trial of the case all of the witnesses, and particularly the petitioner, were interrogated at great length about the alleged leak or crack in the tender. The entire trial centered on that claimed defect. When the case was given to the jury the trial court submitted an interrogatory as follows (R. 114): "Was there, at the time of the accident in queston, a leak in or near the manhole collar on the tender in question?" The jury answered that interrogatory "No." Counsel for the petitioner on the trial had the right under the Illinois law to make the final argument, and in making that argument he dramatically concluded by saying: "So, as I say gentlemen, don't find that there was no leak, or you put him out of the court." (R. 113.)

Before the institution of suit the respondent had supplied the petitioner with hospital and medical care (R. 29) and in addition had advanced the petitioner the sum of $1,375 (R. 60).

The respondent made no motion for a new trial but filed a motion for judgment notwithstanding the verdict, (R. 114) making three points—first, that the petitioner assumed the risk; second, that there was no proof of interstate commerce; and third, that there was no proof of any negligence on behalf of the respondent.

SPECIFICATION OF ERRORS ARGUED.

1. The facts of the case do not warrant leaving the defense of assumed risk to the jury.

2. There is no evidence that the respondent had notice of the presence of the ice.

3. The amendment of August 11, 1939 was not retroactive.

4. There is no evidence in the record to support the charge of negligence.

5. Petitioner cannot ground his case here on Rule 153 of the Interstate Commerce Commission.

6. The petitioner's testimony found to be false by the jury justifies an affirmance of the Appellate Court judgment.

SUMMARY OF THE ARGUMENT.

I.

The Facts of This Case Do Not Warrant Leaving the Defense of Assumed Risk to the Jury.

Great Northern v. *Leonidas*, 305 U. S. 1.
Keys v. *Pennsylvania R. R. Co.*, 308 U. S. 529.
Seaboard Air Line v. *Horton*, 233 U. S. 492.
Southern Ry. Co. v. *Crockett*, 234 U. S. 725.
Jacobs v. *Southern Ry. Co.*, 241 U. S. 229.
C. & O. R. R. Co. v. *DeAtley*, 241 U. S. 310.
Baugham v. *N. Y. P. & N. R. Co.*, 241 U. S. 237.
Boldt v. *Pa. R. R. Co.*, 245 U. S. 441.
T. St. L. & W. R. Co. v. *Allen*, 276 U. S. 165.
C. & O. R. R. Co. v. *Nixon*, 271 U. S. 218.
Roberts Federal Liability of Carriers, Vol. II, 2nd Ed., Sec. 825, p. 1597.

II.

There Is No Evidence That the Respondent Had Notice of the Presence of the Ice.

Missouri Pac. v. *Aeby*, 275 U. S. 426, 430.
Schilling v. *D. & H. R. Corporation*, 114 F. (2d) 69 (C. C. A. 2d, 1940).
Hatton v. *N. Y., N. H. & H. R. Co.*, 261 F. 667, 669 (C. C. A. 1st, 1919).
Great Northern Ry. Co. v. *Johnson*, 207 F. 521, 524 (C. C. A. 8th, 1913).
C. & O. R. R. Co. v. *Mihas*, 280 U. S. 102, 108.

III.

The Amendment of August 11, 1939 Was Not Retroactive.

Winfree v. *Northern Pacific R. Co.*, 227 U. S. 296.
United States v. *St. Louis, etc. R. Co.*, 270 U. S. 1, 3.
United States v. *Heth*, 3 Cranch 399, 413.
Murray v. *Gibson*, 56 U. S. 421, 423 (15 Howard).
McEwen v. *Den*, 65 U. S. 242, 244 (24 Howard).
Sohn v. *Waterson*, 84 U. S. 596, 598, 599 (17 Wallace).
Chew Heong v. *United States*, 112 U. S. 536, 559.
Wichita Falls R. Co. v. *Lindley*, 143 S. W. (2d) 428.

IV.

The Jury Having Found No Leak in the Tender There Is No Evidence in the Record to Support the Charge of Negligence.

Chicago Great Western v. *Rambo*, 298 U. S. 99.

V.

Petitioner Cannot Ground His Case Here on Rule 153 of the Interstate Commerce Commission.

A. To Do So Would Involve Deciding This Case on Issues Not Tried or Submitted to the Jury.

San Juan Light Co. v. *Requena*, 224 U. S. 89, 96, 97.
Illinois Central R. Co. v. *Egan*, 203 F. 937, 939 (C. C. A. 8th).
M. K. & T. Ry. Co. v. *Wilhoit*, 160 F. 440, 443 (C. C. A. 8th).
Snyder v. *Snyder*, 142 Ill. 60, 67.
Lesser Cotton Co. v. *St. Louis, I. M. & S. Ry. Co.*, 114 F. 133 (C. C. A. 8th).
Davis v. *Ill. Collieries*, 232 Ill. 284.
Gascoigne v. *Met. El. Ry.*, 239 Ill. 18.

B. There Was No Violation of the Boiler Inspection Act or Rule 153 Thereunder.

Ford v. *N. Y., N. H. & H. R. Co.*, 54 F. (2d) 342, 344 (C. C. A. 2nd).

Reeves v. *Chicago, St. P. M. & O. Ry. Co.*, 179 N. W. 689, 690 (147 Minn. 114).

Slater v. *Chicago, St. P. M. & O. Ry. Co.*, 178 N. W. 813, 814 (146 Minn. 390).

C. R. I. & P. Ry. Co. v. *Benson*, 352 Ill. 195, 200 (185 N. E. 244).

Harlan v. *Wabash Ry. Co.*, 73 S. W. (2d) 749, 752, 753 (Supreme Ct. of Mo. 1934).

Riley v. *Wabash Ry. Co.*, 44 S. W. (2d) 136, 141.

VI.

Because of the Petitioner's Perfidy the Judgment of the Appellate Court of Illinois Was Correct.

Pomeroy Equity Jur., 5th Ed., Vol. II, Sec. 404.

Soo Line v. *Rock*, 279 U. S. 410.

Ill. Rev. Stat. 1941, Chap. 110, Sec. 189.

ARGUMENT.

I.

Assumed Risk.

This court, in the case of *Great Northern* v. *Leonidas*, 305 U. S. 1, held, in November, 1938, in a suit under the Federal Employers Liability Act, that assumed risk was a defense thereunder, but that in that case it was a question of fact for the jury. After the verdict had been returned in this case and while it was pending in the Appellate Court, in a memorandum opinion in the case of *Keys* v. *Pennsylvania R. R. Co.*, 308 U. S. 529, decided in January, 1940, this court again held that as to that case assumed risk was for the jury. Prior thereto and without exception since the case of *Seaboard Air Line* v. *Horton*, 233 U. S. 492, this court had held that assumed risk was a defense and was, on undisputed facts, a question of law for the court. The case of *Seaboard Air Line* v. *Horton* was followed in numerous decisions by this court, among them being *Southern Ry. Co.* v. *Crockett*, 234 U. S. 725; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 299; *C. & O. R. R. Co.* v. *DeAtley*, 241 U. S. 310; *Baugham* v. *N. Y. P. & N. R. Co.*, 241 U. S. 237; *Boldt* v. *Pa. R. R. Co.*, 245 U. S. 441; *T. St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165; *C. & O. R. Co.* v. *Nixon*, 271 U. S. 218. See Roberts Federal Liability of Carriers, Vol. II, 2nd Ed., Sec. 825, p. 1597.

In the case at bar the petitioner admittedly knew of the existence of the ice and yet without protest proceeded to perform his duties whatever the cause of its being there. Even if his story had been true that it was caused by a leak, he knew it the day before and that the weather was freezing. It was his duty to report any defects to the engineer at the end of their run (R. 49) who each trip turned in a written report of any defect at the roundhouse,

at Milwaukee Junction when they concluded their trip (R. 49), but petitioner made no report of the alleged defect. He had ample time to protest and opportunity to do so with people in a position to correct the alleged wrong, and yet he made no effort in this direction (R. 53). He didn't have to make a sudden choice as counsel for petitioner argue in their brief (p. 41).

This court pointed out in *Seaboard Air Line* v. *Horton* that conduct such as that of the petitioner in this case was assumed risk and not contributory negligence.

The case was clearly one of assumed risk, therefore, under the case of *Seaboard Air Line* v. *Horton* and the numerous cases that followed it, unless this court wishes to expressly overrule them.

II.

Respondent Had No Notice of the Alleged Ice on the Tender.

It is an undisputed principle in cases under the Federal Employers Liability Act that the employer to be held liable must have notice of the dangerous condition or that circumstances be proved from which it must necessarily follow that the employer, in the exercise of reasonable care, would discover the hazard.

As is to be seen from the undisputed facts in this case, no one knows how long the ice had been on the deck of the tender. The weather was clear and cold both on the day of the accident and the preceding day (R. 19). The jury have found that the water did not come there from any leak in the tender as petitioner had falsely testified. Fault or negligence on the part of respondent may not be inferred from the mere fact that petitioner fell and was hurt. *Missouri Pac.* v. *Aeby*, 275 U. S. 426, 430.

Since the record is devoid of any evidence as to how long

the ice was there and how it happened to be there, and since there are no circumstances which have been proved from which it could be reasonably held that the respondent must have known of its presence the essential element of notice is entirely lacking. In the case of *Schilling* v. *D. & H. R. Corporation*, 114 F. (2d) 69 (C. C. A. 2d, 1940), in a suit under the Federal Employers Liability Act the plaintiff sought to recover, because of the alleged negligent failure to repair cinders on a track in which the plaintiff caught his foot where the cinders had washed out. With reference to the question of notice to the defendant of the dangerous condition, the court on page 71 of the opinion said:

> "It was, of course, the duty of the defendant to provide a safe place for the plaintiff to work and such a space in the tie as that in which he caught his foot made it unsafe. Yet proof of that is not alone enough to charge the defendant with liability. It was shown that in the ordinary course of the work the cinder filling in the ties did get washed out, and the duty of the defendant of necessity was one of adequate inspection and timely repair. There is nothing to indicate that the daily inspection provided was not equal to what a prudent man in like circumstances would have done except possibly the testimony by deposition of one trainman in the crew in which the plaintiff worked who came on duty at 4 o'clock that afternoon and testified when asked if he looked at the hole more than once: 'I noticed it all day. It was there before'. He did not report it or state any more definitely the length of time it had been there. As his day began at 4 o'clock that afternoon there was little on which the jury could have found that the hole had been there long enough to charge the defendant with constructive notice and the duty to repair. Proof of actual notice was wholly lacking. One or the other must appear to make out actionable negligence for failure to repair."

Hatton v. *New York, N. H. & H. R. Co.*, 261 F. 667 (C. C. A. 1st, 1919). A suit was prosecuted in this case

against the defendant for negligence in permitting ice to be upon the station platform upon which a gang plank slipped when placed upon it by the trainmen. On page 669 of the opinion the court said:

> "The fact that there was ice on the platform would not of itself warrant a jury in finding that the defendant was negligent. To justify such a conclusion it should have appeared that the defendant knew of its presence and had unreasonably failed to remove it, or that the ice had been there such a length of time that, in the exercise of ordinary care, it ought to have known of it and removed it. *Smith* v. *Railroad*, 73 N. H. 325, 61 Atl. 359. Under the circumstances here disclosed we think there was no evidence from which reasonable men could conclude that the defendant was negligent."

Great Northern Ry. Co. v. *Johnson*, 207 F. 521 (C. C. A. 8th, 1913). On page 524 of the opinion the court said:

> "There is no proof in the record that the railway company knew, or could have known by the exercise of ordinary care, that the pinning of a flue, old or new, would cause a piece to break from the same under the circumstances as detailed by Johnson. An injury that cannot be foreseen or reasonably anticipated as the probable result of negligence is not actionable. *Railway Co.* v. *Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; *McCain* v. *Chicago, B. & Q. R. Co.*, 76 Fed. 125, 22 C. C. A. 99; *Cole* v. *German Savings & Loan Society*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; *Railway Co.* v. *Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Hoag* v. *Railway Co.*, 85 Pa. 293, 27 Am. Rep. 653; *Ness* v. *Great Northern Ry. Co.*, 142 N. W. 165 (Supreme Court, North Dakota, October term, 1912); 5 Thompson on Negligence § 5333."

See also *C. & O.* v. *Mihas*, 280 U. S. 102, 103.

III.

The Amendment of August 11, 1939, Limiting the Defense of Assumed Risk Was Not Retroactive.

The accident in this case happened on February 6, 1937. The suit was filed in Chicago on January 27, 1939. The trial before the jury was completed in June of 1939, and on June 10, 1939 (R. 9) the appeal was perfected to the Appellate Court. It is to be seen, therefore, that two months before the statute was amended the trial of the above case had been completed. The court instructed the jury at the request of petitioner that assumed risk was a defense which the defendant was required to establish by the greater weight of evidence (R. 119, 116). The petitioner recognized, thereby that assumed risk was a complete defense if properly established.

This court in the case of *Winfree* v. *Northern Pacific*, 227 U. S. 296, held that the first Federal Employers' Liability Act was not retroactive. The cause of action accrued in the Winfree case before the statute was passed. An employee working as an engineer met his death while working in interstate transportation. The court held an action could not be maintained under the Federal Employers Liability Act of 1908, and in so doing said:

> "* * * statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required."

In the recent case of *United States* v. *St. Louis, etc. Ry. Co.*, 270 U. S. 1, 3, the same view was taken by this court. The opinion in that case was rendered by Mr. Justice Brandeis. The suits were for services rendered the War Department prior to federal control. The suits were instituted in the court of claims more than three years after

the cause of action accrued but within six years. The Transportation Act of 1920 fixed a three-year limitation period. In holding the act not retroactive the court said:

> "That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure, *United States Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435. There is nothing in the language of paragraph 3 of § 16, or in any other provision of the Act, or in its history, which requires us to hold that the three-year limitation applies under any circumstances, to causes of action existing at the date of the Act."

The Court of Civil Appeals of Texas in *Wichita Falls & S. R. Co.* v. *Lindley*, 143 S. W. (2d) 428, has specifically held this amendment not retroactive.

This court, since its very earliest decisions, has recognized that it is a fundamental rule of statutory construction that a statute is not to be given a retroactive effect, unless by the plain words of the statute such a construction is unavoidable. In the early case of *United States* v. *Heth*, 3 Cranch, 399, the Collector of Customs prior to the enactment of the statute on June 30, 1800 had received certain sums of money for which he was to be compensated on a percentage basis. By the act of June 30, 1800 his compensation was restricted to a smaller commission of 2½% on the amounts collected. The court held the statute did not affect the prior transactions and in so doing said on page 413:

> "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot

be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Murray v. *Gibson*, 56 U. S. 421 (15 Howard). In this case a statute of Mississippi passed in 1846 declared that no record of any judgment recovered in a foreign court against a citizen of Mississippi should be received as evidence after the expiration of three years from the time of rendition of such judgment. This court held that the statute had no application to a judgment rendered before its passage. In so doing the court said on page 423 of the opinion:

"As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only."

McEwen v. *Den*, 65 U. S. 242 (24 Howard). Prior to 1856 under the laws of Tennessee a deed could not be acknowledged or proven in another state before the Clerk of a court. In 1856 a law was passed allowing this to be done. The court held that this statute was prospective only and in so doing said on page 244 of the opinion:

"It is insisted, that the act is retrospective as well as prospective in its operation, and covers the acknowledgment made in 1839, in New York.

"We think the statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to-wit, that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears."

Sohn v. *Waterson*, 84 U. S. 596, (17 Wallace). The appeal in this case was from the Circuit Court for the District of Kansas. A right of action had accrued in 1854. The statute of limitations passed in 1859 barred all actions of the character involved unless commenced within two years next after the cause of action accrued. The court held that the statute did not affect the right of action which accrued in 1854 but that the two-year period started to run from the date of the statute. In so doing the court said, pages 598 and 599:

> "The plaintiff contends that the statute of Kansas cannot apply to actions which accrued more than two years before its passage, because it would cut them off and defeat them altogether, and would thus impair the obligation of contracts.
>
> "A literal interpretation of the statute would have this effect. But it is evident that the legislature could not have had any such intention. The court below held, that as the defendant was a resident of Kansas when the act took effect the time of limitation began ot run in his favor as against the present cause of action from that period; and that the action might have been brought at any time within two years afterwards; and not having been brought within that period it was barred. In other words, the court held that the act was prospective in its operation, and affected existing causes of action only from the time of its passage. This seems to us a reasonable construction and one that prevents the legislative intent from being frustrated. 'Words in a statute,' says Justice Paterson, 'ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed, to them, or unless the intention of the legislature cannot be otherwise satisfied.' And this rule is repeated by this court in *Harvey* v. *Tyler*, where it is said: 'It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect.'"

Chew Heong v. *United States*, 112 U. S. 536. A statute passed in 1882 prescribed that a Chinese laborer should present a certificate on reentering the United States and that the certificate so prescribed would be the only evidence permissible to establish his right of entry into the United States. Prior to the enactment of this statute Heong had left the United States. The court held that the statute of 1882 did not affect his rights and that Heong could return under the terms existing when he left. In so doing the court said on page 559 of the opinion:

> "We have stated the main reasons which, in our opinion, forbid that interpretation of the act of Congress. To these may be added the further one, that the courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In *United States* v. *Heth*, 3 Cranch, 398, 413, this court said that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the doctrine of this court. *Murray* v. *Gibson*, 15 How. 421, 423; *McEwen* v. *Den*, 24 How. 242, 244; *Harvey* v. *Tyler*, 2 Wall. 328, 347; *Sohn* v. *Waterson*, 17 Wall. 596, 599; *Twenty Per Cent Cases*, 20 Wall. 179, 187."

We submit, there is nothing in the language of the amendment indicating an intention to make it retroactive and that petitioner's contention must fail.

IV.

There Is No Evidence in the Record to Support the Judgment.

Since the petitioner voluntarily dismissed paragraphs (a) and (b) and inasmuch as the jury found there was no defect or leak in the tender as charged in paragraphs (d) and (e), it left only paragraph (c) of petitioner's complaint upon which to base the judgment. That paragraph (R. 3) charged that the respondent negligently permitted ice to be upon the tender.

There is no testimony in the record showing how the ice came to be upon the deck of the tender. The only testimony directly bearing upon the question was that of the petitioner who testified that it came there through a leak or crack in the tender. This story, the jury found to be false by their special verdict.

The presence of the ice upon the deck of the tender can only be accounted for by speculation. Neither the petitioner nor anyone else saw any act which produced the ice. Outside of the petitioner, the record is devoid of any proof that any other employee of the respondent had knowledge that the ice was there. There is no evidence as to how long it had been there. Petitioner worked last on the tender the day before. He made no report of any defect and he was the first one to work on the tender after it left the roundhouse the next morning.

Counsels' desperate need of some evidence of negligence is established by their resort to our speculation in our brief in the Appellate Court of Illinois as to how the ice happened to be there (Petitioner's Br., p. 24). No witness testified that water had splashed out when the tank was filled. In trying to account for its presence there some witnesses testified that could have happened (R. 24; 70; 78).

The Appellate Court in its opinion reversing the judgment of the trial court found that there was no evidence in the record to support the allegations of paragraph 4(c) (R. 136).

Unless facts were established in the record to substantiate the charge of negligence a recovery cannot be sustained. *Chicago Great Western R.* v. *Ramba*, 298 U. S. 99.

V.

Petitioner Cannot Ground His Case Here on Rule 153 of the Interstate Commerce Commission.

A. To Do So Would Involve Deciding This Case on an Issue Not Tried or Submitted to the Jury.

It must be remembered that since Counts (d) and (e) of the complaint were eliminated which specifically charged a leak in the tender, it left only paragraph (c). That paragraph (R. 3) charged that the respondent negligently permitted ice to be upon the deck upon the tender. Counsel now seek to sustain their case upon the theory that respondent violated a statute. We have no quarrel with their argument that Rule 153 has the force of law or that the courts are bound to take judicial notice of the rules of the Interstate Commerce Commission. The vice of their position is that under the statute and rule the respondent is virtually an insurer. Under paragraph (c) we were merely charged with being negligent. Under the statute and rule relied upon by petitioner many different things are involved other than those tried before the jury. The rule requires that the tender be kept clean, obviously free from coal and dust which would fall over from the fuel portion of the tender. The rule requires that means be provided to carry off the waste water. It was never claimed until after the judgment was reversed that means were not provided to carry off the waste

water or that the deck was not clean (R. 209). A superficial examination of the record will show those issues were not tried. So we repeat—the vice of the situation is that the rule presents a distinct issue from that tried before the jury except, of course, for the alleged leak, and on that a jury trial, admitted to be fair under proper instructions, resulted in a finding there was no defect.

We have heretofore pointed out that the entire trial was consumed in thrashing out the issue as to whether there was a leak in the tender as so elaborately and falsely testified to by the petitioner.

If paragraph 4c was meant to charge a violation of the safety appliance acts why were the acts not specifically referred to as in (d) and (e)? The failure to mention them and to rely only on negligence could do nothing but mislead the trial court and the respondent if counsel had even intended to charge statutory violations thereunder.

Under countless decisions in the federal courts, in Illinois and in other states the rule is well established that a party will not be permitted to raise issues in a court of review for the first time which were not presented to the court below.

San Juan Light Co. v. *Requena*, 224 U. S. 89. On pages 96 and 97 of the opinion the court said:

> "It is urged that the negligence charged in the complaint related only to the condition of the wiring *inside* the residence of the deceased, and therefore that the court erred in permitting a recovery on the theory that the defendant was negligent in respect of the maintenance and care of the wires and converters *outside*. This contention must fail. While the complaint was not drafted with commendable precision, and, if critically examined, might be regarded as leaving it uncertain whether the negligence charged related to the wiring inside or to that outside whereby the current was supplied, there was no objection to this uncertainty in the court below. On the contrary,

the trial proceeded, as we have seen, upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party without objections from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of variance. Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review." (Italics ours.)

Illinois Central R. Co. v. *Egan*, 203 Fed. 937, (C. C. A. 8th). On page 939 of the opinion the court said:

"It is claimed in this court for the first time that the court below erred in holding that this cause is not one arising under the national Employer's Liability Act but under the state statutes of Iowa. Whether this was error it is unnecessary to determine in this action, as this objection was not made by the defendant in the court below, but, on the contrary, it insisted at every stage of the proceeding, from the time the motion to remand was filed until the close of the trial, that the cause was not one arising under the act of Congress but under the Iowa statutes. Therefore, even if it was error, which we do not decide, the defendant having invited it, and induced the court to commit it, it cannot now be heard to complain. *New York Elevated R. R. Co.* v. *Fifth National Bank*, 135 U. S. 432, 441, 10 Sup. Ct. 743, 34 L. Ed. 231; *Walton* v. *Chicago, etc., Ry. Co.*, 56 Fed. 1006, 1008, 6 C. C. A. 223, 225; *Chase* v. *Driver*, 92 Fed. 780, 786, 34 C. C. A. 668, 674; *Mechanics' Insurance Co.* v. *C. A. Hoover Distilling Co.*, 182 Fed. 590, 593, 105 C. C. A. 128, 131, 31 L. R. A. (N. S.) 873.

Nor is it permissible for one who tries his case upon one theory to change his position in the appellate court and ask for a reversal upon another and inconsistent theory. *New York, etc. Ry. Co.* v. *Estill*, 147

U. S. 591, 614, 13 Sup. Ct. 444, 37 L. Ed. 292; *Lesser Cotton Co.* v. *St. L., I. M. & S. Ry. Co.*, 114 Fed. 133, 142, 52 C. C. A. 95, 104; *Chicago, etc., Ry. Co.* v. *Voelker*, 126 Fed. 522, 529, 65 C. C. A. 226, 233, 70 L. R. A. 264; *Missouri, etc., Ry. Co.* v. *Wilhoit*, 160 Fed. 440, 443, 87 C. C. A. 403, 404."

M. K. & T. Ry. Co. v. *Wilhoit*, 160 Fed. 440, (C. C. A. 8th). The action instituted was to recover damages for personal injuries received by the plaintiff as a section man in defendant's employ. The trial resulted in a judgment for the plaintiff, and while the judgment was reversed on other grounds, the court said on page 443 of the opinion:

"We come next to several assignments predicated upon instructions refused, and others given, bearing upon the question, whether the plaintiff has assumed the risk of injury incident to his continued use of the defective car. The Court of Appeals was of opinion that this defense was not available to the defendant because it was not affirmatively pleaded in the answer. But the question of pleading thus suggested was not raised upon the trial. On the contrary, as the record discloses, each of the parties, without objection from the other, introduced testimony addressed to the question of the plaintiff's assumption of the risk, both presented requests for instructions bearing thereon, and the court charged the jury upon that subject. *We must, therefore, give effect to the settled rule, that when the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court of review.*" (Italics ours.)

Snyder v. *Snyder*, 142 Ill. 60. In that case proceedings were instituted to have a conservator appointed for an insane person. In the trial court the case was tried upon the theory that the question was whether the defendant had sufficient mental capacity to transact ordinary busi-

ness, whereas, under the statute, the question was whether the person was possessed of "sufficient mental capacity to care for and manage his estate." The court was asked to reverse the case because of this error. On page 67 of the opinion the court said:

> "Several other instructions given for the defendant announced the same principle in a different form. In view of the instructions given for the defendant at her request, if the theory upon which the court proceeded was not the correct one, it having been adopted at the request of the defendant, she can not now complain of the action of the court: *Calumet Iron and Steel Co.* v. *Martin*, 115 Ill. 358; *Illinois Central Railroad Co.* v. *Latimer*, 128 id. 163."

See also:

Lesser Cotton Co. v. *St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, (C. C. A. 8th); *Davis* v. *Ill. Collieries*, 232 Ill. 284; *Gascoigne* v. *Met. El. Ry.*, 239 Ill. 18.

B. There Was No Violation of the Boiler Inspection Act and Rule 153 Thereunder.

The jury found that mechanically there was nothing wrong with the tender or water tank. The presence of ice upon the deck of the tender had nothing to do with its mechanical operation. This did not constitute a defect within the meaning of the Safety Appliance Act. In the case of *Ford* v. *N. Y., N. H. & H. R. Co.*, 54 F. (2d) 342 (C. C. A. 2d), in which certiorari was denied, 285 U. S. 549, the evidence showed that there was grease on the handhold of one of the grab irons on the locomotive. In all other respects the locomotive was in good working condition. The court held that this did not constitute a violation of the two acts mentioned and in so doing said on page 344 of the opinion:

> "An examination of the debates in Congress on the passage of these acts, shows no intention by Congress

to impose civil liability for a condition occurring during the operation of the train which does not affect the construction and maintenance as required by the Safety Appliance Act. 61st Congress, 2d Session, Senate Documents, 446; 52d Congress, vol. 23, Congressional Record, pp. 592-5; volume 24, pp. 1273-1287; Senate Committee Report, vol. 24. Congressional Record, pp. 1246-1251."

Reeves v. *Chicago, St. P., M. & O. Ry. Co.*, 179 N. W. 689 (147 Minn. 114). In this case an employee met injuries because of a piece of coal upon a step leading to the locomotive cab. The court held this did not constitute violation of either act, and said on page 690 of the opinion:

"Plaintiff also contended that the federal 'Boiler Inspection Act,' so-called (U. S. Comp. St. §§ 8630-8639), as amended in 1915 (U. S. Comp. St. §§ 8639a-8639d), so as to 'apply to and include the entire locomotive and tender and all parts and appurtenances thereof,' and which makes it unlawful to use any locomotive engine propelled by steam power in moving interstate traffic unless the boiler and appurtenances thereof are in proper condition and safe to operate, and providing for inspection from time to time, creates a liability on the facts of this case. We think this act must be construed, as was the Safety Appliance Act, so as not to include cases where some foreign substance has found a temporary lodgment upon the appliances of the locomotive or tender, and which is not the result of the ordinary use of such instrumentalities but came there accidentally from some unforeseen cause."

Slater v. *Chicago, St. P., M. & O. Ry. Co.*, 178 N. W. 813 (146 Minn. 390). In this case the plaintiff met his injuries because a trespasser without the knowledge of the railroad displaced an ice bunker so that it projected upon the running board. On page 814 of the opinion the court said:

"Does the fact that a trespasser surreptitiously has placed a temporary obstruction like a loose board or cover upon a running board of a railroad car show a

violation of the act referred to? We think not. The running board itself was secure and mechanically perfect. There is no hint of any defect therein either as to material, workmanship, or design. The statute ought not to be construed as guaranteeing against the acts of trespassers, at least not unless such acts render the running board itself mechanically insecure. Sleet makes a running board insecure or unsafe for use; yet, we apprehend, it will not be contended that the Safety Appliance Statute is violated if a brakeman slips upon a running board coated with ice during a sleet storm."

The Supreme Court of Illinois in *C., R. I. & P. Ry. Co.* v. *Benson*, 352 Ill. 195 (185 N. E. 244) held the Safety Appliance Act was not violated where wire was wrapped around the grab irons. The court said on page 200 of the opinion:

"The grab-irons or hand-holds on the car in question complied with this section of the act. The wire which had been placed thereon by some person was no part of the grab-iron. (*Reeves* v. *C., S. P., M. & O. Ry. Co.*, 179 N. W. 689; *Slater* v. *C., St. P., M. & O. Ry. Co.*, 178 id. 813; *Craver* v. *Franklin Cotton Mills*, 145 S. E. 570.)"

Harlan v. *Wabash Ry. Co.*, 73 S. W. (2d) 749 (Supreme Ct. of Mo. 1934). It was claimed in this case that the failure of fellow employees to close a trap door in the floor of the cab over the stoker constituted a violation of the Boiler Inspection Act and the Safety Appliance Act. The court said, on pages 752 and 753 of the opinion:

"Defendant contends, and we think correctly so, that the facts proven do not show or constitute a violation of the Boiler Inspections Act, under our ruling in *Riley* v. *Wabash Ry. Co.*, 328 Mo. 910, 44 S. W. (2d) 136, 139. The evidence here does not show any mechanical defect from use or originally in the engine or any appliance thereof. It was not a mechanical defect or any faulty construction to have a trapdoor in the floor of the engine cab for the purpose of af-

fording access to the coal conveyor operating underneath the floor. Such was proper and necessary in case this mechanical stoker became clogged or needed adjustment or repair. The trapdoor was without defect and operated safely in the way and for the purpose intended. It was intended to be closed when not in use and the engine became 'unsafe to operate in the service to which the same was put' only because of the negligent act of leaving the trapdoor open when it ought to have been closed. The Boiler Inspection Act (45 U. S. C. A. § 22 *et seq.*) was not intended to cover the negligent act of an employee in the use or misuse of an appliance safe and proper in itself and free from mechanical defects."

In *Riley* v. *Wabash Ry. Co.*, 44 S. W. (2d) 136 it was contended that placing a clinker hook on the tender tank in such a way as to make it an element of danger constituted a violation of the Safety Appliance and Boiler Inspection Acts. The court said on page 141 of the opinion:

"The gist of plaintiff's instruction, authorizing a verdict against defendant, is that if the jury found that the servants or agents of defendant company, placed a clinker hook on top of the tender tank in a loose, insecure, and unsafe position, so as to render the tender unsafe to operate, resulting in plaintiff's injury, then defendant was liable, not having complied with the Boiler Inspection Act. The instruction does not require the jury to find that there was any defect, or that the tender was not properly equipped. All the jury was required to find was that defendant's servants or agents had misplaced the clinker hook, thereby creating the unsafe condition.

"This is not sufficient for a recovery under the Safety Appliance Act or Boiler Inspection Act."

We respectfully submit that to now hold that the judgment of the trial court could be sustained on the ground that there was a violation of the rules of the Interstate Commerce Commission when those rules were not alluded

to in the pleadings, or the evidence or the arguments of counsel or the instructions would be to deprive the respondent of its right to a trial by jury.

Counsel extol the virtues of a jury trial at great length in their brief (p. 53) and yet the essence of their argument about the interstate commerce rules is to ask that the judgment be affirmed on issues the jury never heard. In other words, they seek to deprive the respondent of a jury trial on the new issues here raised under Rule 153.

In their brief in this court (p. 17) counsel say that ice was something unclean within the meaning of the rule. But in the Appellate Court of Illinois that was not their position. In their petition for rehearing (R. 146) they said: "there was ice on the top of the tender which was dangerous and caused the plaintiff to be injured. *This was a direct result of the failure of the defendant to keep the top of the tender clean.*" In other words, something other than ice was involved. We respectfully submit that if we are to be held for something other than negligence, respect for enlightened jurisprudence requires that the issue be tried. To do otherwise makes a sham of the proceedings in the trial court.

VI.

Because of the Petitioner's Perfidy the Judgment of the Appellate Court of Illinois Was Correct.

Petitioner in elaborate detail and on repeated occasions testified that the tender was cracked and split and that water leaked out of it and that the stream was about the size of a pencil at the manhole where water is taken into the tender. Counsel for respondent fairly and dramatically warned the jury that if they found against the petitioner on that issue they would throw him out of court. The fairness of the trial is admitted by all. The jury, after being

fairly warned, and in answer to a specific interrogatory, found that that story of the petitioner was false. Under the Civil Practice Act of the State of Illinois (Sec. 189, chap. 110 Ill. Rev. Stat. 1941) if there is any inconsistency between the general verdict and a special verdict the latter controls.

Petitioner's testimony was material to the issues being tried. In fact the record readily discloses that that was virtually the only issue tried. The jury, therefore, found in effect that the petitioner committed perjury in the trial of this case.

In a court of equity the unclean hands of the petitioner in this respect would be sufficient to bar a recovery. Pomeroy Equity Jur., 5th Ed., Vol. II, Sec. 404. This court in the case of *Soo Line* v. *Rock*, 279 U. S. 410, denied recovery to a badly injured employee where he had fraudulently got another party to take a physical examination for the railroad which Rock would have been unable to pass. It is true the opinion in the Rock case was based on the want of a binding contract because of the fraud of the employee. We submit, however, that petitioner's false testimony is a far more serious matter than the fraud in the Rock case. Petitioner's conduct tends to bring the courts into disrepute. For this high court to say to him now that despite his perjured testimony conclusively established on the trial, admitted by him to be fair, that doubtful legal questions and factual issues will be resolved in his favor would be to invite misrepresentation, deceit and false testimony in the courts throughout the land.

We submit that for this reason alone the finding of the courts of review of the State of Illinois that the petitioner is not entitled to recovery should not be disturbed.

Conclusion.

For the foregoing reasons the respondent submits that the judgment of the Appellate Court of Illinois should be affirmed.

Respectfully submitted,

H. Victor Spike,
Silas H. Strawn,
Harold A. Smith.

SUPREME COURT OF THE UNITED STATES.

No. 124.—October Term, 1942.

Norvel H. Lilly, Petitioner, vs. Grand Trunk Western Railroad Company. } On Writ of Certiorari to the Appellate Court, First District, State of Illinois.

[January 11, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner brought this action in Illinois state court under the Federal Employers' Liability Act[1] and the Boiler Inspection Act[2] for personal injuries sustained on February 6, 1937, in the course of his employment as a brakeman in interstate commerce. A general verdict of $32,500 was returned in his favor by the jury, but on appeal the Appellate Court of Illinois for the First District entered judgment for respondent notwithstanding the verdict.[3] The Supreme Court of Illinois refused leave to appeal. We granted certiorari because of the important questions presented in the interpretation of the above-mentioned federal statutes.

Petitioner fell from the top of the locomotive tender while he was pulling a water spout, which was at the side of the track, over the tender's manhole by means of a rod and hook, preparatory to filling the tender's tank with water. As to the circumstances of the accident petitioner testified that the top of the tender between the water manhole and the fuel space, an area of some six square feet, was covered with ice; that there was a small leak at the collar of the manhole from which water flowed onto the tender's surface; that the rod, used for pulling the water spout over the tender, was frozen in the ice, and he had to kick it free; that he stood on the ice and braced himself as he reached out with the rod to pull the spout; and that as he pulled, the rod's hook slipped on the spout, and his feet simultaneously slipped on the ice, causing him to fall to the ground.

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[1] 45 U. S. C. §§ 51 *et seq.*
[2] 45 U. S. C. §§ 22 *et seq.*
[3] 312 Ill. App. 73, 37 N. E. 2d 888.

Petitioner's complaint charged negligence generally with respect to the presence of ice on the tender and also alleged as separate violations of the "Federal Safety Appliance Act" (more properly the Boiler Inspection Act), first that respondent used "a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that . . . the top where the plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life or limb, and the tender leaked there, . . .", and secondly that respondent used "a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the . . . tender . . . at the part where the water is supplied . . . to be (sic) cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, . . . rendering it likely and liable for the water to freeze and cause a dangerous condition, . . ."[4]

When the jury rendered its general verdict for petitioner, it also answered in the negative the following special interrogatory submitted by respondent:

"Was there, at the time of the accident in question, a leak in or near the manhole collar on the tender in question?"

Respondent then moved for judgment notwithstanding the verdict on the ground that the answer to the special interrogatory removed all question of violation of the Boiler Inspection Act from the case, that there was no evidence of negligence, and that in any event petitioner assumed the risk. The trial court denied this motion, but on appeal it was held well taken in all respects.

For our purposes the case resolves into two questions: (1) Granting, as the jury found, that the tender did not leak, could the jury nevertheless find that the Boiler Inspection Act was violated by the presence of ice on the tender's top; and, (2) Was the jury properly instructed that it might so find? We believe that both questions should be affirmatively answered and that the judgment below should be reversed.

The Boiler Inspection Act (§ 2) provides:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler,

[4] At the close of his case petitioner voluntarily dismissed two additional counts charging general negligence in supplying a defective rod and hook and general negligence in supplying a defective water spout.

tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U. S. C. § 23.

Negligence is not the basis for liability under the Act. Instead it "imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate without unnecessary peril to life or limb." *Southern Ry. Co.* v. *Lunsford*, 297 U. S. 398; 401; *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521; cf. *Brady* v. *Terminal R. R. Assn.*, 303 U. S. 10. Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act. *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, 210-211; *Great Northern Ry. Co.* v. *Donaldson*, 246 U. S. 121; *Baltimore & O. R. R. Co.* v. *Groeger*, *supra*. The Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. Cf. *Great Northern Ry. Co.* v. *Donaldson*, *supra*; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 295-96; *Louisville & Nashville R. R. Co.* v. *Layton*, 243 U. S. 617, 621; *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.*, 294 U. S. 529, 531. And, the Interstate Commerce Commission is broadly authorized to set the standards of compliance by prescribing "rules and regulations by which fitness for service (of locomotives, tenders and their appurtenances) shall be determined", *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612, provided that, it has been said, the Commission finds such are required to remove unnecessary peril to life or limb. *United States* v. *B. & O. R. Co.*, 293 U. S. 454; cf. *Southern Ry. Co.* v. *Lunsford*, *supra*. With these considerations in mind, we turn to the first question.

The use of a tender, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve "unnecessary peril to life or limb"—enough so as to permit a jury to find that the Boiler Inspection Act has been violated. Fortunately, we are not left wholly to our own resources in construing the Act in the light of its humanitarian purpose. The

Interstate Commerce Commission has set the standard here by promulgating a rule (No. 153) that the "Top of tender behind fuel space shall be kept clean and means provided to carry off waste water."[5] From the phrasing of Rule 153 we think it aimed at requiring the top of the tender to be kept free of foreign matter which would render footing insecure, for example, coal, dust, debris, grease, waste water, and ice. While the locomotive inspection rules are generally devoted to details of construction and specification of materials, at least one other rule deals with the condition of surfaces upon which employees must stand.[6] In using the word "clean" the Commission must have meant something more than mere manner of construction or mechanical operation because "clean" does not naturally lend itself to such a limited connotation. That something more is the continuing duty of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous.

From various cases denying recovery under the Act respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter.[7] But there is no warrant in the language of the Act for construing it so

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[5] The full text of Rule 153 follows:

153. Feed water tanks.—(a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

(b) Not less frequently than once each month the interior of the tank shall be inspected, and cleaned if necessary.

(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. Suitable covers shall be provided for filling holes.

See Official Pamphlet of Interstate Commerce Commission, Bureau of Locomotive Inspection, Orders dated October 11, 1915, to February 21, 1929; Roberts, Federal Liabilities of Carriers (2d ed.) vol. 2, p. 2069.

[6] Rule 117 provides:

117. Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing.

See Official Pamphlet, *supra*, and Roberts, *op. cit.*, p. 2062.

[7] Ford v. N. Y., N. H. & H. R. Co., 54 F. 2d 342 (grease on a locomotive grab iron held no violation of Safety Appliance and Boiler Inspection Acts); Reeves v. Chicago, St. P., M. & O. Ry. Co., 147 Minn. 114, 179 N. W. 689 (presence of coal upon a step leading to the locomotive cab held no violation of Safety Appliance and Boiler Inspection Acts); Slater v. Chicago, St. P., M. & O. Ry. Co., 146 Minn. 390, 178 N. W. 813 (holding no cause of action under Safety Appliance Act for injuries caused by an ice bunker displaced by a trespasser so it projected upon the running board); C. R. I. & P. Ry. Co. v.

narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment "in proper condition and safe to operate . . . without unnecessary peril to life or limb". Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb. Whatever else may be said about the cases relied upon by respondent, they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation.

Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. No claim is advanced that the rule is invalid, and we see no reason for questioning it. Adopted in the exercise of the Commission's authority, Rule 153 acquires the force of law and becomes an integral part of the Act (cf. *Napier* v. *Atlantic Coast Line, supra; United States* v. *B. & O. R. Co., supra*), to be judicially noticed. *Caha* v. *United States*, 152 U. S. 211, 221-22. The failure of petitioner's counsel to call Rule 153 to the attention of the trial court should no more deprive petitioner of its benefits than the failure to plead specifically the Federal Employers' Liability Act foreclosed the application of that Act on appeal to test the correctness of the trial judge's refusal to charge in *Grand Trunk Ry. Co.* v. *Lindsay*, 233 U. S. 42, especially when, as here, the rule only fortifies a result which we think the jury could probably have reached even in the absence of such a rule.

Concluding that the jury had a right to find a violation of the Boiler Inspection Act by reason of the presence of ice on the top of the tender even though there was no leak, we turn now to the second question: Was the jury properly instructed that it might so find? The court below held and respondent here earnestly insists that with regard to the Boiler Inspection Act the case was tried solely on the theory that the only violation of that Act charged was that the tender leaked, and the answer to the special

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Benson, 352 Ill. 195, 185 N. E. 244 (Safety Appliance Act held not violated by wrapping wire around grab-irons); Harlan v. Wabash Ry. Co., 335 Mo. 414, 73 S. W. 2d 749 (failure of fellow employees to close a trap door in the cab over the stoker held no violation of the Boiler Inspection and Safety Appliance Acts); Riley v. Wabash Ry. Co., 328 Mo. 910, 33 S. W. 2d 136 (holding no cause of action existed under Boiler Inspection Act for injuries sustained because a clinker hook was misplaced on a tender top by a fellow servant).

interrogatory therefore removed all question of violation of the Act from the case. This was not the view of the trial judge, and while the record is not as satisfactory as we might wish, we agree with him.

It is true that both charges of violation of the Act do allege the presence of a leak, and petitioner's counsel did say in his closing argument to the jury: "So, as I say, gentlemen, don't find there was no leak, or you put him (petitioner) out of court." But there is no reason to penalize petitioner for remarks of counsel uttered in an excess of zeal, and the full text of the complaint is such that it is fair to say that the presence of a leak was vital to only one charge of violation of the Act, being merely an incidental, non-essential allegation of the other.[8] This was the understanding of the trial judge, upon whom rests primarily the function of interpreting the pleadings. For in overruling respondent's motion for judgment notwithstanding the verdict the trial judge said: "Now, whether there was a crack or not, yet still the question of the Safety Appliance (Boiler Inspection Act) could remain in there

[8] Thus while a leak is alleged in paragraph 4(d) of the complaint, the full text makes it clear that the gist of the charge is simply the presence of ice:

"d. Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb in that the defendant required, caused and permitted plaintiff to work on the tender of the locomotive of his train on the occasion above charged, in the act of putting water in the tender of the locomotive, this tender was unsafe because the top where the plaintiff was required to work was slippery and covered with ice and other slippery materials to endanger his life or limb, and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition on top of the tender and was thrown and caused to fall and be seriously injured."

On the other hand the essence of Paragraph 4(e) is the presence of a leak as the following full quotation shows:

"e. Defendant did then and there unlawfully and contrary to the Federal Safety Appliance Act use and permit to be used on its line of railway at Ferndale Yard, Michigan, a locomotive and tender which was in improper condition and unsafe to operate in the service, and its condition constituted unnecessary peril to life and limb, in that the defendant did operate this locomotive and tender with the tender of this locomotive at the part where the water is supplied to and poured into the locomotive to be cracked, worn and split, so as to occasion and permit the leaking of water from and through this crack, hole and aperture and to flood, seep and cover the top of the tender where plaintiff was required to be in the performance of his duties as employee, rendering it likely and liable for the water to freeze and cause a dangerous condition, and thereby, by reason of this violation on the part of the defendant of this Federal Safety Appliance Act, the water in this tender did leak through this defective place onto the top of the tender, and did freeze, and it thereby caused plaintiff, while he was so at work, as above charged, on the top of this tender, to slip and be thrown and seriously injured."

if the Court did feel that it was the duty of the defendant to keep the tender clear so that the man might operate."

In his instructions to the jury the judge read the Boiler Inspection Act and stated:

"'You are instructed that under the law the defendant was bound to furnish to the plaintiff a locomotive, at the time in question, which was safe to be used, and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk.'"

Respondent took no exception. We think this charge sufficiently informed the jury that it could find a violation of the Act from the presence of ice, even if there were no leak. Evidently this was the understanding of the jury because it found nothing incongruous in simultaneously answering the special interrogatory negatively and returning a general verdict for petitioner despite counsel's statement that a finding of no leak would put his client out of court.

Since petitioner's injuries were the result of respondent's violation of the Boiler Inspection Act, the partial defense of contributory negligence and the bar of assumption of risk are not available to respondent under §§ 3 and 4 of the Federal Employers' Liability Act, 45 U. S. C. §§ 53, 54, as those sections existed at the date of the accident. This disposition of the case makes it unnecessary to consider either whether respondent was generally negligent, or the merits of petitioner's contention, based on the premise that respondent was so negligent, that the 1939 amendment to § 4 of the Federal Employers' Liability Act, 53 Stat. 1404, completely abolishing the defense of assumption of risk in actions under that Act, should be given retroactive application.

Under the facts of this case and the applicable law the jury could rightfully find for petitioner. The benefits of that rightful determination should not have been taken from him.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice FRANKFURTER concurs in the result.